The Role of International Norms in American Jurisprudence

A Senior Honors Thesis

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by

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One could argue that there are few issues that have transcended the debates among U.S Supreme Court Justices to permeate the general fabric of society like the use of international norms in American jurisprudence. This hot button issue has captivated all aspects of government and has led to intense debates over the place of foreign influences in the interpretation of our constitution. The U.S Supreme Court Justices have engaged in the use and repudiation of foreign precedent. This can be seen in their written opinions as well as scholarly debates with one another at universities across the country. The United States Congress has also injected itself into the action, attempting to introduce broad legislation aimed at stifling the use of international norms. Former Congressman Tom Feeney of Florida signed onto several resolutions condemning the use of foreign authority in judicial opinions. He has argued that "[t]he people of the United States have never authorized…any federal court to use foreign laws to essentially make new law or establish some rights or deny rights here in the United States."[1] Not to be forgotten is scholarly commentary on the issue. While the use of international norms is certainly not something new to judicial interpretation, within the past 20 years the debate has come to a head.[2] It is now a frequent topic of scholarly writing on American jurisprudence as well as discussions of the jurisprudence of specific justices.

A common misunderstanding of the issue is what actually constitutes an international norm. When Justice Scalia argues that "modern foreign legal material can never be relevant to an interpretation of the meaning of the U.S. Constitution,"[3] what is he referencing? Austen L. Parrish, an Associate Professor of Law at Southwestern Law School, addresses this issue in his

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[1] Tom Curry, *A Flap Over Foreign Matters at the Supreme Court: House Members Protest the Use of Non-U.S. Rulings in Big Cases*, MSNBC News, Mar. 11, 2004, http://msnbc.com/id/4506232

[2] I used the 20 year mark because I feel that Scalia has really brought the issue to the attention of people through his fervent disapproval. He was appointed in 86 so twenty years was a good mark.

[3] Cleveland, Sarah H. "Is There Room for the World in Our Courts?" The Washington Post 20 Mar. 2005. 5 Feb. 2007 <http://www.washingtonpost.com/wp-dyn/articles/A48939-2005Mar19.html>.

article “Storm in a Teacup: The U.S. Supreme Court’s Use of Foreign Law.” He argues that it would be “foolish to suggest…that…foreign rulings are legally binding on American courts…” There is most assuredly a consensus that the courts are not suggesting we be bound by laws of other nations. It is commonly understood that the Unites States is a sovereign nation and that the only laws binding in the U.S. are U.S. laws, not laws of other countries. It is thus safe to argue that foreign law has no *direct* bearing on the interpretation of the United States Constitution. Now, this is not to say that foreign law is not taken into consideration by the justices when attempting to decide what is best for the people. The key is that foreign laws are not *legally binding* in the U.S. Justice John Paul Stevens summarized this idea best when he said:

> It does seem to me that there is a vast difference between, on the one hand considering the thoughtful views of other scholars and judges-whether they be Americans or foreigners and whether they be state judges, federal judges or judges sitting in other countries-before making up our own minds, and on the other hand, treating international opinion as controlling our interpretation of our own law.[4]

It is with the above justification that those who accept the use of international norms tend to include international laws as part of them. In summary, international law is included when referencing the practice of justices applying international norms to their jurisprudence in that the laws of foreign countries shape their understanding and consideration of the issue. International law is not included in the sense that it is not in any way viewed as binding in the U.S. Closely related to international laws are international treaties and other agreements in writing that have been codified by one or more countries. While, again, these are not binding in the U.S. (with the exception of, say, a treaty that the United States has signed), they do inform the opinions of the justices and are often taken into account by those justices who believe international norms are

[4] John Paul Stevens, Justice Stevens Remarks, Seventh Circuit Judicial Conference Dinner 2, 8 (May 23, 2005)

important when interpreting the U.S. constitution. Justice Stevens, for example, has "cited foreign practice and multilateral treaties"[5] in his written opinions.

In conjunction with international laws, treaties, and practices that are present when one references international norms, there is another concept included in the phrase that is commonly referred to as "standards of decency"[6] or an "international consensus."[7] This is often the language used in opinions issued in "America's culture wars [in]…the death penalty, abortion and gay rights."[8] It seems to be a growing trend in opinions issued by the Supreme Court to cite the overwhelming international majority. This majority is often found in the general beliefs of the human race and almost always references a moral standard. With the use of these tools in interpreting the constitution, the questions ultimately arises as to what exactly is the standard of decency or an international consensus and how could they possibly be measured with any degree of certainty as to make them legitimate. This is a growing concern among conservative members of the court who are disturbed by the "court's apparent willingness to 'impose foreign moods, fads, or fashions on Americans'."[9] The choice in words of Justice Clarence Thomas when describing the use of an international consensus illustrates the frustration on the part of many who believe that this type of foreign influence has no place in the U.S. court system. The justices who invoke the use of an international standard of decency and its application to U.S. Constitutional interpretation believe that it is, in and of itself, enough to warrant its use. In other words, due to the fact that an international consensus has formed on an issue is enough to warrant its use in forming the opinions of the court. Former Justice Sandra

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[5] Treanor, William *The Jurisprudence of Justice Stevens* 74 FORDAM L. REV. 1557-1605 2005-2006
[6] Roper v. Simmons, 543 U.S. at 587 (Stevens, J., joined by Ginsburg, J., concurring).
[7] Roper v. Simmons, 543 U.S. at 605
[8] Cleveland, Sarah H. "Is There Room for the World in Our Courts?" The Washington Post 20 Mar. 2005. 5 Feb. 2007 <http://www.washingtonpost.com/wp-dyn/articles/A48939-2005Mar19.html>.
[9] *Id*

Day O'Connor has agreed that "the existence of an international consensus…can serve to confirm the reasonableness of a consonant and genuine American consensus."[10] This is in direct opposition to other members of the court like Scalia who argued that the reliance on "civilized standards of decency in other countries is totally inappropriate as a means of establishing the fundamental beliefs of [the U.S.].[11]

Ultimately, the legitimacy behind the use of an international consensus relies on the definition of it. Measuring such things as standards of decency could be done most easily by looking at the foreign laws and practices of other countries and finding a majority opinion across a broad section. An example of this would be looking at laws for or against murder in a cross section of countries. I believe that there is no binding law in any country rewarding murder but there are definitely laws in every country punishing murder. Taking this simple evidence, it could be said that there is a definite consensus among the international community that murder is wrong. I would argue that this is the type of general consensus that the Supreme Court Justices reference when they are talking about an international consensus or a standard of decency. This, coupled with expressly written international laws, treaties, etc, encompasses the nature of international norms with reference to their use in the justice system of the U.S. While often called by one name or another, for the purposes of this paper, international law (used as described above by Justice Stevens), international consensuses, international standards of decency, and international norms will all refer to those foreign influences that have made their way into the jurisprudence of the American Justice System through the opinions of the Supreme Court Justices.

[10] Roper v. Simmons, *supra* 6
[11] Thompson v. Oklahoma, 487 U.S. 868 n.4 (Scalia, J., joined by Rehnquist, C.J. and White, J., dissenting)

It is, however, somewhat ambiguous to reference the use of international norms without expressly citing where they appear and how they appear. It has been stated previously that the use of international norms is present in many of the opinions written on such Supreme Court cases as abortion, gay rights, and the death penalty. These sensitive topics with the common element of humanity that can be understood in all countries lend themselves to be debatable on an international scale. In other words, punishment of a human, sexuality, and the right to life debates have a common moral quality that is present in all cultures. Because of this, these types of cases invite opinions that encompass international norms. Writing an opinion, however, is more than reviewing international dicta and drawing a conclusion. It can be compared to a complex mathematical proof, where the justice's opinion on the issue is not good enough to change an existing law. While we do hold justices to a higher standard, they are citizens and have no more right to change a law based on opinion then you or I. The art is determining when the opinion is shared by enough citizens or states that it holds a significant weight to be upheld as a law. When looking for a national consensus, a justice can make connections through voting patterns, polls, and the overturning of past precedent pertaining to similar laws. Deciphering international opinion is considerably more difficult. In reading international laws, the justices must be aware of the government of that state, whether it is legitimate, and whether the mass population of the state is sufficiently represented in the government. This can be extremely time consuming when taking into account the courts' docket and other responsibilities.

To circumvent this process slightly, the court has relied heavily on amicus curiae briefs as a means of flushing out national and international opinion. Amicus curiae briefs, or "friend of the court" briefs, have the intent of helping the courts obtain information.[12] Simply put,

[12] Behuniak, Susan *Friendly Fire: amici curiae and Webster v. Reproductive Health Services pgs 179-192* in Slotnick, Elliot E., ed. Judicial Politics: Readings From Judicature. 3rd ed. CQ P, 2005

interested parties in the case submit documents containing information and reasoning as to why the court should vote their way on a certain issue. In the case of determining national and international opinion, briefs are written on behalf of countries and large organizations within the United States. For example, if a right to life organization were arguing that abortion should be outlawed, they might conduct internally funded research on abortion practices in other countries. The group would then submit this information to the courts in hopes of bringing to light a consensus that was found to be in their favor.[13]

The court uses amicus curiae briefs as an informal information service. The U.S. government submits amicus curiae briefs in a majority of cases and these briefs have been shown to be an effective means for demonstrating a consensus of support for one side of the case. In a recent brief submitted to the Supreme Court of North Carolina on behalf of the European Union on a writ of certiorari for the case McCarver v. State of North Carolina, a growing international consensus in favor of the petitioner was cited. It then proceeded to justify this consensus with research.[14] By providing the courts with briefs such as these, it makes determining a national or international consensus much easier. Because these briefs have become more readily available in recent years due to expedited communication through email and the internet, the use of international norms as justification for domestic laws has increased.

The written opinions of the court and the amicus curie briefs that inform them are not the only instances where the debate over international norms has flourished. In more recent years, scholars have taken great interest in the evolution of the use of international norms in American Jurisprudence. What was once thought of as a new trend, the reference to foreign precedent has

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[13] Baum, Lawrence. The Supreme Court. 7th ed. Congressional Quarterly Books, 2000. 128-178.
[14] Wilson, Richard J. "Brief of Amicus Curiae The European Union In Support of the Petitioner." Washington College of Law, American University. 3 Mar. 2007 <http://www.eurunion.org/legislat/DeathPenalty/McCarverEUAmicusCuriaeBr.doc>.

been traced back to the Declaration of Independence[15] and the Federalist Papers[16]. A large part of the scholarly writing on the use of international norms has examined the instances of reference to them in documents starting with the founding of the United States and ending with present Supreme Court opinions. The misconception that this is a new phenomenon has come about for several different reasons. Perhaps the most convincing source was Justice Scalia himself, who "identifies the Court's first use of foreign sources 'for the purpose of interpreting the Constitution' as the 1958 Eighth Amendment case of *Trop v. Dulles*…"[17] Countering this were Justice Stevens' remarks in *Thompson v. Oklahoma*, where he argued that the use of international norms in arguments involving the evolving standard of decency and the Eighth Amendment were not just traced back to the opinion of Chief Justice Earl Warren in *Trop v. Dulles* "but rather to a turn-of-the-century opinion of the Court." This opinion, written in *Weems v. United States*, "held that the term 'cruel and unusual punishments' operated to invalidate a sentence [and was] derived from Spanish law…" Not withstanding this example from *Weems*, much of the basis for Scalia's recent criticism has stemmed from the fact that he feels the Court has taken the practice of using international norms and injected into other cases beyond just those dealing with Eighth Amendment issues. While there is no doubt that the decision in *Trop v. Dulles* set a benchmark for the use of international norms, there is considerable evidence that the practice started at the inception of our nation.[18] Much of our Constitution, as well as the Bill of Rights, is based off of the law and practice of England. This reliance on English interpretation and practice is very

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[15] Ginsburg, Looking Beyond, *supra* 6, at 14
[16] Cleveland, *supra* 8
[17] Cleveland, Sarah H. "Our International Constitution." 2006 The Yale Journal of International Law 31:1. HeinOnline. pg 5. (*citing* Antonin Scalia, Keynote Address at the American Society of International Law Proceedings: Foreign Legal Authority in the Federal Courts, *in* 98 AM. SOC'Y INT'L L. PROC. (2004); *see also* Ann Gearan, *Foreign Rulings Not Relevant to High Court, Scalia Says,* Wash. Post, Apr. 3, 2004, at A07)
[18] *supra* 5 at 1601

present in the opinions of the Supreme Court regarding the interpretation of the Eighth Amendment prohibition of cruel and unusual punishment.

As stated above, the evidence for this has been found in numerous popular documents that are the basis for our country, not just in court opinions as the debate might lead one to believe. Sarah H. Cleveland, a Professor in Law at the University of Texas School of Law, argues that there are "cases where the Constitution expressly refers to international law or a concept of international law."[19] She uses this to argue that since international law seems to have informed our interpretation of the Constitution, it would make sense that it is cited in constitutional law cases. Cleveland provided numerous examples of international law references in the Constitution, both when discussing "offenses against the law of nations" and the power to enter into treaties and other agreements with foreign nations. The law of nations "is now loosely translated as customary international law"[20] and with that it seems that Cleveland has been able to trace the use of international norms directly to the formation and language of the Constitution. This, obviously, is a strong argument against Scalia's categorization of "the first use of foreign sources", not to mention his beliefs in how the Constitution should be read and used by the courts. There have been similar studies to Cleveland's that have been done using court opinions dating back to the opinions of Chief Justice John Marshall in the early nineteenth century. In an opinion written for a case stemming from the War of 1812, Chief Justice John Marshall reflected, "In expounding [the] Constitution, a construction ought not lightly to be admitted

[19] Cleveland, *supra* 17 at 12

[20] *Id* (citing Jeremy Waldron, *Foreign Law and the Modern* Jus Gentium, 119 HARV. L. REV. 129, 132-33 (2005) at 135; *see also* Louis Henkin, *A Century of Chinese Exclusion*, 100 HARV. L. REV. 853 n.2 (1987); *see also* Mark Westin Janis, The American Tradition of International Law: Great Expectations 1789-1914, at 1-24 (2004); *see also* Edwin Dickenson, *The Law of Nations as Part of the National Law of the Unted States*, 101 U. PA. L. REV. 26,26-33 (1952).)

which would give to a declaration of war an effect in this country it does not possess elsewhere."[21]

With significant evidence of the use of international norms in the jurisprudence of Supreme Court justices, both past and present, the question arises not of if they are used but if they *should be used*. I will explore the justifications for both sides of the debate later in this paper. I would argue, however, that on either side of the issue there is a common concern that if international norms are applied, it not be in an arbitrary manner. Chief Justice Roberts argues that being allowed to cite foreign practice allows the members of the court "to incorporate his or her own personal preferences, [and] cloak them with the authority of precedent."[22] He summarizes the concern of many opponents of the use of international law when he said:

> [R]elying on foreign precedent doesn't confine judges. It doesn't limit their discretion the way relying on domestic precedent does…Foreign law, you can find anything you want. If you don't find it in the decisions of France or Italy, it's in the decisions of Somalia or Japan or Indonesia, or wherever. As somebody said in another context, looking at foreign law for support is like looking out over a crowd and picking out your friends. You can find them. They're there. [23]

This norm shopping that Roberts is describing is not dissimilar to the court shopping done by defendants and plaintiffs alike. It is, rightly so, almost an abuse of international norms that common knowledge would suggest was not intended by those who first started using international consensus to justify decisions. Scalia is been quoted several times as criticizing the Court "for selectively citing foreign sources that support its views while ignoring practices

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[21] Cleveland, *supra* 8

[22] Parrish, Austen L. "Storm in a Teacup: The U.S. Supreme Court's Use of Foreign Law." 2007. University of Illinois Law Review . Vol 2007 No. 2 at 651 (citing *Court in Transition: From the Hearings,* N.Y. Times, Sept. 14, 2005, at A26; see also Edwin Meese III, *Commentary: Supreme Choice…with Encore,* Wash. Times, Sept.23, 2005, at A21)

[23] *Court in Transition: From the Hearings,* N.Y. Times, Sept. 14, 2005, at A26

abroad that contradict our constitutional norms."[24] When does the application of international norms become a fishing expedition for laws in other countries that support a justice's point of view while ignoring the laws that admonish it?

Abortion is an excellent example of a case of individual rights with no finite national or international consensus. International laws stemming from the establishment of treaties, UN resolutions, and global customs have historically steered away from the issue, leaving it up to the individual countries. This leaves the justices with a myriad of laws from one country to the next that have essentially no binding characteristics. The laws on the books in individual countries are from one extreme to the other, ranging from the forbiddance of the practice to very liberal abortion laws. Many examples can be provided where countries have much stricter abortion laws than those of the United States while "most advanced industrial democracies broadly protect abortion rights."[25] It hardly seems fair to assert that the laws of some countries have more bearing than the laws of other countries. It is argued, therefore, that international norms can not be used at all because doing so would automatically show favor to those states that support a justice's opinion while ignoring and in effect shunning those states that go against it.

The same goes for the justification of abortion laws based on national opinion. Several Supreme Court decisions subsequent to *Roe v. Wade* have stated that there is a growing national consensus against a certain type of abortion or abortive practice. The fact of the matter is, however, that if there were a strong enough national consensus the courts would not have to practice judicial activism because the legislature would be passing laws repudiating or affirming abortion rights. Justices citing a national consensus for the limiting of abortion rights send the message that there is a group of people in the United States whose opinion matters more than

[24] Cleveland, *supra* 8
[25] *Id*

that of another group. Furthermore, this type of justification affords no protection to this minority because, unless overturned by the justices themselves, the decision stands as law.

Abortion is not the only contentious issue that justices have used to illustrate the apparent absurdity of international norms. Trial by jury and the restriction of women's rights have also been used to argue against this practice. Justice Scalia participated in a debate during the appeal of the juvenile death penalty case *Roper v. Simmons* when this very subject was brought up. It was asserted that the trend against executing juveniles was extremely pervasive. Justice Scalia responded that most of the world does not allow for trial by jury. "Should we yield to the rest of the world on that practice as well?"[26] His response strikes at the core of the debate over the use of international norms in American jurisprudence. Since there is no systematic way to assign international norms and these norms vary from issue to issue, it is argued that they are an improper means for determining national law.

Before going into an in depth examination of the arguments for and against the use of international norms, the ultimate question one might have is why the debate is important. Why are people writing about this, why is it a problem, why should the average American care? Alexis de Tocqueville once said, "Scarcely a political question arises in the United States that is not resolved, sooner or later, into a judicial decision." The United States has, since it's founding, been engaged in a debate over the use of international norms in determining public policy. Through its individual decisions, the courts have contributed a great deal to the national policies of the United States as well as the nation's attitudes towards foreign policy. The Supreme Court's assumption of this role has been facilitated by several circumstances. Because so many important legal questions come through its docket, the Supreme Court has the opportunity to

[26] Mauro, Tony. "High Court Hears Arguments on Executing Juveniles." Law.Com. 14 Oct. 2004. Legal Times. 5 Feb. 2007 <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1097686235208>.

shape a wide range of policies. In doing so the Court has engaged in a great deal of what is often called judicial activism. This practice generally refers to court decisions that make significant changes in public policy, particularly in policies established by other institutions.[27]

With so much of today's public policy focusing on the United States as an international actor, it is little wonder that the nine justices on the Supreme Court have continually debated the use of international norms when justifying written opinions, both for the majority and the minority. This is not a debate, however, that began when the Bush White House transformed its foreign policy goals to encompass the idea that the United States should be spreading democracy though out the world. The same questions that the courts are wrestling with now were present almost two centuries ago. The constant debate over the place of international laws in American jurisprudence reflects two fundamentally different attitudes of the United States and its role in the international system. Ultimately, the question is where we stand with respect to the rest of the world. On the one hand, the public policy arising out of judicial decisions comes from the interpretation of our constitution and the inherent independence of our political system from those of other societies. On the other hand, our place in the international system is that of a leader, in which we must take into account the international consensus when defining our policies, policies that we expect the world to embrace.

Both of these views are represented in today's Supreme Court. Justices Antonin Scalia and Stephen Breyer are considered to be the most outspoken on the issue, with Thomas and Kennedy not far behind. Scalia and Thomas believe that international norms should not be used or reflected in our laws. Scalia called "irrelevant" "the practices of the 'world community,' whose notions of justice are (thankfully) not always those of our people."[28] Breyer and Kennedy

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[27] Baum, Lawrence. The Supreme Court. 7th ed. Congressional Quarterly Books, 2000. 185-194.
[28] *Atkins v. Virginia*, 536 U.S. 304 (2002)

sharply disagree, arguing that international norms should be used due to the increasing globalization and interconnectedness of our world. Former Justice Sandra Day O'Connor agrees with Breyer and Kennedy. "International law is a help in our search for a more peaceful world."[29]

Noam Chomsky, a professor and political activist, has said "it is understood that only those with the guns can establish 'norms' and modify international law."[30] Many in the United States subscribe to this view. They feel that until someone can conquer them militarily they can create a world that does not account for any existing international laws or norms. Those who seek, however, to make an exception and differentiate the American judicial and political system from the international community are failing to recognize that the United States is an active participant in the formation of the norms and laws it is fighting to ignore.

In examining the two viewpoints, there are several factors one must take into account. Among these are the constitution, its origin, and the place it holds in today's society. From there one can begin to analyze past precedent. Not only has the court made decisions by taking into account international law, but the same justification for those decisions is being used in today's opinions. It is important to keep in mind when evaluating the arguments for and against the application of international norms that the United States is an active participant in the formation of the norms and laws that some are arguing are irrelevant in judicial decision making.

As stated previously, the debate over the use of the international norms in American jurisprudence is not a new one. This is because the root of the debate stems from the right of the justices to interpret the Constitution. The tension among the Supreme Court Justices on how to in "do their job", so to speak, has only been intensified, not created, by the debate over the use

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[29]"O'Connor Praises International Law." World Net Daily. 27 Oct. 2004. 3 Mar. 2007 <http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=41143>.

[30] Chomsky, Noam. "Dominence and Its Dilemmas." Boston Review: a Political and Literary Forum. 2003. Massachusetts Institute of Technology. 5 Mar. 2007 <http://bostonreview.net/BR28.5/chomsky.html>.

foreign precedent. The arguments over constitutional interpretation are centered on the question of what sources should be taken into account when interpreting the constitution and how much weight should these relevant sources of authority be given. This is very similar to the questions of international norms and their relevance as justification for judicial opinions. Just as some justices argue that a growing international consensus, the global economy, and past precedent justify the use of international norms, many others use these same reasons to argue against their application. Austen Parrish feels that, largely, "the rejection of the use of foreign materials rests on the argument that judges must confine themselves to considering the original intent of the Framers when deciding constitutional cases."[31] This line of argument comes in the forms of originalist and textualist interpretations of the constitution. Parrish argues that "despite recent attempts to resuscitate [these modes of deciding cases], the legal mainstream long ago rejected or discounted [them], at least in their extreme forms."[32]

Parrish's reference to the attempted revival of originalist interpretation is most likely pointing to the outspoken opinion of Justice Antonin Scalia. Among the justices on the Supreme Court that put heavy stock in interpreting the constitution using the original intent of the Framers, Scalia has become the example used most often to illustrate the practice. This is probably because he has been very open about his belief in textualism as well as arguing against the use of international norms. Scalia practices what is known as American constitutional exceptionalism. When reflecting on the founding of our country and government he urges that "if there was any thought absolutely foreign to the founders of our country, surely it was the notion that we Americans should be governed the way Europeans are."[33] It is easy to see the historical

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[31] Parrish, *supra* 22 at 641
[32] *Id* at 641 supra 18
[33] Scalia, Justice Antonin. "Outsourcing American Law." American Enterprise Institute. American Enterprise Institute, Washington DC. 21 Feb. 2006. 3 Mar. 2007 <http://www.ngowatch.org/articles.php?id=215>.

justification for Scalia's remarks. What is less known, however, is the immense impact that foreign scholars, philosophers, and statesmen had on the Constitution itself. The drafters of the Constitution were well versed in international law and intended to use it to take their place among the other nations. This is evident through the writings of Thomas Jefferson and John Jay. Jay, who was the first chief justice of the United States, stated that "the United States had, by taking a place among nations of the earth, become amendable to the laws of nations."[34]

While recognizing foreign influences in the drafting of the Constitution, opponents for the application of international norms stress that once the constitution was signed, it became the law of the land and regardless of what influenced its creation, when it became law it became beyond reproach. There is an obstacle, however, to using the Constitution as the sole arbitrator of modern day law. Justice Scalia has argued, "modern foreign legal materials can never be relevant to an interpretation of…the meaning of the U.S. Constitution."[35] But what is the true meaning behind the Constitution and how do we interpret it? There are two distinct opinions as to how the Constitution should be read. These are, as a living document, or as an unchanging guideline.. They have also been referred to as interpretivism and noninterpretivism.

Interpretivism, otherwise known as originalism, is the principle that judges, in resolving constitutional questions, should rely on the express provisions of the Constitution or upon those norms that are clearly implicit in its text. This is the approach that emphasizes original intent and argues that the leading framers were interpretivists and believed that constitutional questions should be reviewed by that approach. There are several forms of originalism that are significant when examining the sources used in constitutional interpretation. Perhaps the most "pure" form of originalism is known as intentionalism. Intentionalism, or "original intent" theorists, interpret

[34]Cleveland, *supra* 8
[35] *Id*

the constitution based on the intention of the framers. They believe that, in reviewing laws, it becomes of special importance to take into account the intentions of the authors of the Constitution. Intentionalists look at the writing of the Framers to come up with somewhat of a guide on how to read the writing in the Constitution. If the Framers all referenced cruel and unusual punishment in their other writing, for example, intentionalists would have more than one source be able to aid them in the interpretation of the constitution. The same can be said for belief systems of the Framers which, while not necessarily explicitly written down, could be implicit from their other writings.

There are several problems with using the originalist approach of intentionalism to interpret the Constitution. Some of these problems have been addressed by scholars who have asked several important questions that have weakened the argument for intentionalism. The first is that, assuming that intentions of the Framers could be found in their other writings, it is unclear that there is one common intention presented in the Constitution. As we know from the notes taken at the Philadelphia convention, there were very lively debates over specific language used in the Constitution. Many scholars argue that this is a clear indication that one intent cannot be found and that, for this reason, the originalist's use of intent as a means of constitutional interpretation is flawed. Another problem is that, assuming one intention was present in the Constitution at the time of its creation, the justices who practice originalism have no guarantee that they will be able to correctly identify this intention and apply it to modern day jurisprudence. It is for these reasons that intentionalism, perhaps the most extreme form of originalism, has been "widely critiqued as unrealistic and unworkable."[36]

In response to the criticism of intentionalism as a means of interpreting the constitution, originalists have adapted to a new understanding of originalism focusing on the "meaning" of the

[36] Parrish, *supra* 22 at 663

Constitution. These texualists, as they are commonly referred to, are "originalists who give primary weight to the text and structure of the Constitution. Textualists are often skeptical of the ability of judges to determine collective 'intent.'"[37] The fact that they give "primary weight" to the text and structure of the Constitution is an important point when analyzing the interpretative approach of textualists. Nicholas Zeppos has found through his analysis of citation patterns that the Court has never subscribed to a "strict originalist methodology."[38] Rather, he says, "the Court's approach is eclectic, relying not only on text and originalist sources, but on practical considerations and other dynamic sources as well."[39] It is with this in mind that textualists approach the interpretation of the constitution, not with the idea of deriving its original intent, but rather with the practical goal of distorting its meaning as little as possible. This method of constitutional interpretation, rather than strict original intentionalism, more closely mirrors the practices of Scalia. In an address to the Catholic University of America, Scalia made the distinction between intentionalism and what he identifies as his interpretive methodology.

> "The theory of originalism treats a constitution like a statute, and gives it the meaning that its words were understood to bear at the time they were promulgated. You will sometimes hear it described as the theory of original intent. You will never hear me refer to original intent, because as I say I am first of all a textualist, and secondly an originalist. If you are a textualist, you don't care about the intent, and I don't care if the framers of the Constitution had some secret meaning in mind when they adopted its words. I take the words as they were promulgated to the people of the United States, and what is the fairly understood meaning of those words."[40]

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[37] http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/interp.html
[38] Parrish, *supra* 22 at 664, (citing Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1099-120 (1992))
[39] *Id* at 664 supra 190
[40] Scalia, A., A Theory of Constitution Interpretation, speech at Catholic University of America, 10/18/96.

This seems to be a straightforward and natural way of interpreting the Constitution. It is certainly accepted by the vast majority of scholars that originalism, specifically textualism, is an important aspect of interpretation. "Virtually all Constitutional scholars agree that the specific intentions of the Framers count for something and that sometimes the text can be decisive."[41] We are left, then, with those inevitable instances when the text is not decisive. It could be inferred by Scalia's choice of textualism that he believes original meaning can be found in every phrase of the Constitution. As scholars have pointed out, however, this is not necessarily the case. Alexander M. Bickel has questioned whether "Constitutional language like 'equality' and 'liberty' even had a fixed meaning from which to derive original understanding."[42]

So if not originalism, what? Judicial opponents of originalism as the only method of interpreting the constitution don't believe they are bound solely by the original intent, textual meaning, and structure of the constitution. This philosophical belief regarding the interpretation of the constitution has been labeled as noninterpretivism. Noninterpretists appreciate the value in looking to the original text of the Constitution but feel that there are other very important sources that must be consulted when deciding the constitutionality of a specific law or situation. While the Framers produced a document that is very helpful to the formation of laws, noninterpretivists recognize that they could not have possibly accounted for the evolution of society in any specific way. Noninterpretivism "allows the Constitution to evolve to match [a] more enlightened understandings on matters."[43] It recognizes the Constitution to be a living document. The methodology of noninterpretivism, often referred to as judicial gap-filling, allows for the

[41] Parrish, *supra* 22 at 665 supra 202
[42] Parrish, *supra* 22 at 664 (citing Alexander M. Bickel, *The Original Understanding and the Segregation Decision,* 69 HARV. L. REV. 1, 59-65 (1955))
[43] http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/interp.html

consultation of a vast array of sources, including but not limited to "text, intent, precedent, history, structure, value, and pragmatic consequences."[44]

There are several different forms of noninterpretivism, just as there are degrees of originalism. Perhaps the most prominent of these is contextualism. Contextualism, while it is concerned with the original text of the Constitution, seeks to interpret it by looking at a broad picture of the context in which the law or decision was promulgated. This broad context invites the use of a historical basis on which to decide matters related to the Constitution. Noninterpretivism asserts that the meaning of the constitutional text and the intention of the framers can not be ascertained with the sufficient precision needed to guide constitutional decision making in today's world. It is, therefore, necessary to take into account past precedent, growing consensuses, the evolving standards of decency, and the general evolution of society when interpreting the Constitution. Noninterpretivists' main argument centers on the idea that blindly following intentions of the past doesn't deal with the needs of contemporary society.[45] The assertion is strengthened by the idea touched on earlier in the paper that often, the intentions of the past are not known. Just as using modern legal materials to interpret the Constitution might seem subjective to some, so is the idea of finding a "true" meaning in the actual text. Paul W. Kahn, through his research on constitutions, has concluded that it is not often the case that provisions "have a single, definite meaning in any community prior to the process of interpretation."[46] This view seems to suggest that the process of interpretation is what gives a text meaning and if this is true, interpretation must be based on other things but the text itself.

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[44] Parrish, *supra* 22 at 655 (citing Vicki Jackson, *Constitutional Comparison: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109 (2005) at 122)
[45] *supra* 12, citing Wallace, J. Cliffor *Interpreting the Constitution: The Case for Judicial Restraint. 33-37*
[46] Parrish, *supra* 22 at 665 (citing Paul A. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 Harv. L. REV. 1161)

> "[A constitution's meaning is] not a thing waiting to be discovered by a judge. It only has an identifiable shape after the judge articulates the conclusion of an interpretative inquiry…. [I]t is not possible for a judge-or anyone else- to consider the meaning of [constitution language] without drawing on a wealth of experiences, arguments, and values that range across local, national, and even international communities."[47]

The position of Kahn largely supports Zeppos' argument that nothing can be interpreted by absolute originalism.[48] The question then arises of where to draw the line. If pure originalism cannot be accomplished, what sources does the originalist feel are compatible with their idea of constitutional interpretation? It seems obvious that any answer to this question is highly subjective and could be qualified in any number of different ways.

Much of the debate stems from the practice of judicial activism. Judicial activism generally refers to court decisions that make significant changes in public policy, particularly in policies established by other institutions.[49] Since so many policy issues eventually find their way into the courts, the sources used in judicial decision making are of extreme importance when considering judicial activism. One concern is that noninterpretivism allows for the importation of personal preferences into the decision making process instead of relying solely on the constitution. This is closely related to the idea that citing foreign precedent in American legal decisions allows judges to "troll deeply...in the world's *corpus juris*' to reach a politically preferred outcome."[50] While is it commonly believed that noninterpretive practices invite more decisions based on the personal views of the justices themselves, research has shown that "there is simply no value-neutral way to choose among possible specifications of the Framers' abstract

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[47] Parrish, *supra* 22 at 665

[48] Parrish, *supra* 22 at 664, (citing Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1099-120 (1992))

[49] *supra* 12, citing Wallace, J. Cliffor *Interpreting the Constitution: The Case for Judicial Restraint. 33-37*

[50] Parrish, *supra* 22 at 650

intent."[51] Anthony Cook argues that "original understanding [is] no more than an artifice for imposing [the judge's] own political vision…"[52]

It is generally thought that originalists, if they are to influence or change policy, can fall back on the justification that the policy reflects the text and intent of the framers. It has been argued that this is not the case, however, for noninterpretivists who have gone outside the constitution when engaging in judicial activism. For example, it has become a concern that because of the influence of international norms, policies are no longer free of foreign influence and therefore, threaten our freedom. "Citation to foreign law sources has become synonymous with judicial activism, sometimes eliciting shrill claims of an out-of-control Court."[53] Often in determining what sources should be consulted, originalists appeal to the use of "American sources" and tend to shy away from the use of foreign practice, precedent, etc. This argument stems from the idea that the citation of international norms is a new phenomenon. As previously argued in the paper, this is simply not the case. While it is a tendency among originalists to view international practices as not relevant to our constitutional interpretation, Parrish points out that "originalism struggles to explain why citation to foreign sources *must* be banned in constitutional decision making."[54]

I would argue that the originalist's rejection of foreign legal materials and laws as an appropriate source for constitutional interpretation is a rather unconvincing one. Because the original intent for most, if not all, of the Constitutional text is not obvious, the originalist must rely on other sources for constitutional interpretation. While the noninterpretivist allows for a generous library of sources, the originalists limit themselves to those they deem "relevant" in

[51] *Id* at 664
[52] *Id* at 664
[53] *Id* at 647
[54] *Id* at 666 (emphasis added)

preserving the original meaning of the constitution. This seems to be very ambiguous and highly subjective but most seem to be together on their rejection of foreign sources and influence. It is my opinion that this is because the word "foreign" is used as a trigger word, if you will. While they (the originalists) find it hard to articulate exactly what goes into their interpretation of the constitution, surely it would seem that we are sovereign and that we are not bound by foreign influence. From this, I would argue, that the originalist sees any citation of international norms as binding the American people to a set of beliefs that we as "free" people, should not be bound by. It is in this way that the originalists treat foreign citations superficially, rejecting them solely because they did not originate as part of the American tradition and, because of this, should have no binding influence. They make the mistake of treating all foreign materials as if the use of them would be to endanger American sovereignty rather than to inform judicial opinion. "At times, the criticism has had a xenophobic tone to it, playing on 'exaggerated fears: fear of foreign domination, fear of judicial activism, fear of the unknown.'"[55]

Just as the differing views on constitutional interpretation shape the way in which one supports or rejects the use of international norms, so does the way the justices view the sovereignty of America and its interdependence on the world community. It seems to follow that certain philosophical beliefs on constitutional interpretation, namely those of textualism and intentionalism, tend to hold a view of American sovereignty sacred over any inclination that we as a country should associate ourselves with foreign precedent. There is a tension between this school of thought and those who reference the globalization of the modern world as a justification for the citation of international norms. In general, it is noninterpretivist judges who believe one must take into account the opinions and practices of the world community. As Justice Stephen Breyer articulated in a debate with Justice Antonin Scalia over foreign law,

[55] *Id* at 646

"…we live in a world where I think it's out of date for people to teach about foreign law in a course called 'foreign law.'"[56] Many are of the same opinion as Justice Breyer. It would seem nearly impossible to be as educated as the Supreme Court Justices are and not have a concept of today's society that encompasses an understanding of the larger world community. While I would venture to say that all the Justices on the Supreme Court today would agree they are well aware of foreign precedent, it is the use of that knowledge when deciding American legal issues that proves to be a very contentious issue in American jurisprudence. While Justice Scalia has categorically denied the importance of foreign sources in shaping our laws, Justice Breyer argues that "things outside the United States [can] be relevant to an understanding of how to apply the American Constitution."[57] It would seem, then, as if one might have to choose between what Scalia feels is the sovereignty of the United States and the idea that we can no longer ignore the views of the world of which we are a part.

Interestingly enough, the arguments for the use of international norms in American jurisprudence are inextricably tied to our own views of foreign policy as well as our interactions with other countries. At the risk of getting involved in a discussion over the foreign policy during these last eight years, one cannot help but see the irony in the denial of foreign precedent as a factor in judicial decision making. It seems that for all of the "vitriolic responses from Justice Scalia and, sometimes, Justice Thomas"[58], we as a people have a very different response when it is our norms that we expect the world to follow. While we purport to know what is best for the world community, we have a very negative reaction to the idea that the world community might

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[56] Scalia, Antonin, and Breyer, Stephen. "Constitutional Relevance of Foreign Court Decisions." U.S. Association of Constitutional Law Discussion. American University, Washington D.C. 13 Jan. 2005. 27 Feb. 2005. Federal News Service. 2 Feb. 2009 <http://www.freepublic.com/focus/f-news/1352357/post>.

[57] *Id*

[58] Parrish, *supra* 22 at 639

have some say in what is best for us as a nation. This fear of foreign domination has played itself out through the debate over the use of international norms in American jurisprudence.

Roger P. Alford, in his paper *Misusing International Sources to Interpret the Constitution*, argues that limits should be in place regarding the application of international law to the interpretation of the United States' Constitution. He feels that "[u]sing global opinions as a means of constitutional interpretation dramatically undermines sovereignty."[59] Similarly, Jeremy Rabkin of Cornell University argues that foreign nations are actively attempting to influence court decisions, with a goal to undermine the sovereignty of the United States. Testifying at a Congressional hearing on House Resolution 568, he argued that the European Union "is really set on…undermining American sovereignty" by "infiltrate[ing] into our judicial system this idea that our judges need to listen to what their judges say."[60] The point that these scholars are trying to make is that the implementation of laws in the U.S., the justification for which are laws in other countries, undermines our independence. The argument is centered on the idea that if foreign actors play a role in the making of our laws, there becomes a discrepancy in accountability. In the United States, when a bill is passed and is signed into law, the American people are able to hold the legislature accountable for the law, insofar as they elect the people who drafted and enacted it. In the case of court decisions that interpret the laws, the Judges are not elected by the people. Furthermore, "the use of foreign law 'surrenders U.S. sovereignty to non-U.S. decision-makers' who are not accountable to the people of the United States."[61]

Opponents of this view, those that feel that the sovereignty of the United States is not threatened by the use of international references, offer several arguments for their position. Parrish argues that "the suggestion [that U.S. sovereignty is threatened] confuses the use of

[59] *Id* at 660
[60] *Id* at 660
[61] *Id* at 660

foreign law as an interpretative aid with presuming that foreign law is controlling. Citing research done by David S. Law, he suggests that any accusation that the courts are "using foreign sources for something more than persuasive authority"[62] is based off of pure speculation. This makes sense when one considers the nature of the way in which the Supreme Court justifies their decisions. How would any person, let alone the Supreme Court Justices, separate their knowledge of foreign law from the influence that knowledge has over their jurisprudence? Justice Scalia has said "that judges should read foreign legal materials as much as they want, but just not put the citations in the opinions."[63] It seems to me that, if this were the case, one of two things would happen. Either an opinion would be riddled with reasoning that is justified through the use of international precedent and is just not noted, or the opinion would properly cite the reasoning behind it's decision and therefore, upset those that feel foreign influence has no place in American jurisprudence.

Scalia's suggestion that the problem of foreign influence would be mitigated if foreign sources were not cited is a superficial fix to the problem. For, just because foreign influence is not cited does not mean it does not drive the opinion's reasoning, subconsciously or otherwise. Scalia seems to suggest that one can actively partition knowledge we have acquired and make certain that it does not affect any part of our reasoning apparatus. I think most would agree this is simply not the case. Whether we agree to ban the explicit use of foreign sources, I would argue that it is impossible to control the implicit use of them. This idea is mirrored in Alexander Aleinikoff's *Thinking Outside the Sovereignty Box: Transitional Law and the U.S. Constitution*. He argues that the fear of sovereignty loss "starts with an unrealistic view of states as

[62] *Id* at 661
[63] *Id* at 675

hermetically sealed polities exercising sole jurisdiction over their territory and people."[64] The idea that the United States is completely immune from foreign influence is, just as Aleinikoff states, unrealistic. Even the documents that the United States are founded on are historically known to foreign influence. Parrish points out the fact that the debate over the use of foreign sources is somewhat backwards. "To the extent that the lines between the domestic and the foreign have blurred, it has occurred already."[65] It should not necessarily be a concern about keeping foreign sources out of the United States, but rather about how to remove them since they are already present. When the debate shifts to this question, it becomes harder to justify a position in which there is no foreign influence in the United States. The new argument, one could imagine, would be how to limit any *further* foreign influence.

The sovereignty argument takes another form in Sarah H. Cleveland's article *Our International Constitution.* She argues that the "primary objection raised to consideration of *international* law in constitutional interpretation is that the practice suffers from a democracy deficit."[66] The key feature of this objection is the classic countermajoritarian concern. Cleveland cites the argument of Alexander Bickel to expound on this point. He identifies the countermajoritarian concern in describing judicial review as the power to interpret the Constitution "against the wishes of a legislative majority."[67] This is similar to the above argument against the use of foreign sources, namely that the citizens can't hold anyone accountable for a decision based on foreign law. Cleveland finds fault in this argument, stating that "to the extent that the Constitution imposes limits on legislative decision-making though individual rights provisions and the structures of federal and separation of powers, judicial

[64] *Id* at 662
[65] *Id* at 663
[66] Cleveland, *supra* 17 at 101
[67] *Id* (citing Alexander M. Bickel, "The Least Dangerous Branch: The Supreme Court at the Bar of Politics" 20 (1962))

enforcement of those rights and relationships is necessarily nonmajoritarian."[68] This practice is in place regardless if the law contains foreign influences or not. For that reason, the countermajoritarian concern regarding the use of foreign law is "readily rebutted."[69]

While differences in methods of constitutional interpretation and the sovereignty argument are both key features of the debate over the use of international norms, much of the discussion revolves around the relationship between human rights and constitutional rights. Gerald L. Neuman, in his paper entitled *The Uses of International Law in Constitutional Interpretation*, argues that "the postwar development of international human rights law has widened the field for interaction between international law and constitutional interpretation."[70] He points to international human rights treaties as the catalyst for this interaction. When these treaties were signed, they required implementation. The method of implementation, however, was left up to the signatories. Neuman suggests that while "legislative enforcement of the treaties would be sufficient" and the treaties don't "mandate implementation through cooperative constitutional interpretation", the system of enforcing international human rights has been largely played out in the courts.[71]

The fact that the legal system in the U.S has often cited international law and treaties could be explained by an appeal to function. The function of both the U.S. court system as well as international human rights treaties is to protect the rights of a human being. Because both of these systems are charged with protecting the same rights, it is natural that they would overlap. The problem that this overlap creates is concisely identified by Neuman. "Juxtaposing the constitutional and international systems with regard to a right that they both protect (such as

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[68] *Id* at 101
[69] *Id* at 101
[70] Neuman, Gerald L., "The Uses of International Law in Constitutional Interpretation" 2004 The American Journal of International Law 98:1 at 84
[71] Neuman, *supra* 70 at 84

freedom of expression, or fair trial) multiplies the possibilities for competing influences on the interpretation of the right."[72] It seems as though this argument with reference to human rights laws is mirrored by the argument for and against methods of constitutional interpretation. It is the charge of the Originalists that using supplemental sources in constitutional interpretation has the consequence of "muddying the waters" when it comes to deciphering the intentions of the framers. By looking to other sources, it increases the probability that one will be able to find a justification for their opinion that is different from what the constitutional language would explicitly or implicitly prescribe. This same argument, in a different form, is what Neuman points out (as quoted above). By having several systems by which to secure a human right, the ways in which to justify the securing of it increase exponentially.

Furthermore, it would seem that the justification that a justice chooses to employ in his jurisprudence of human rights would be arbitrary in the sense that they could cite any one specific source or all of the sources that could possibly contain the justification. Using the example from above, the justification for defending a person's right to a fair trial could come from the U.S. Constitution as well as an international human rights treaty. To the extent that a justice chooses to use one or the other as background for their decision would seem to implicate them as favoring either the Constitution or the treaty, respectively. But it does not follow that a citation referencing an international treaty ignores the Constitution and vice versa. I believe this is a powerful argument to mitigate the possible problems that come with the use of international sources. The opponents of the practice argue that the justification for a decision needs to be found in the U.S. Constitution but it does not follow, as they might have one think, that any justification using international sources *cannot* be found in the constitution as well. It could be

[72] *Id* at 85

that the international example was the more obvious and straightforward explanation for a certain decision.

An important point to take from Neuman's paper is that it deals primarily with the interaction between countries' constitutions and international treaties. While the nature of this interaction is certainly noted in the debate over the use of international norms, the main point of contention deals with the use of independent foreign sources, independent meaning that the U.S. has not signified their approval of them by signing on to enforce them. It could be argued that the use of international treaties in justificatory language is less contentious because the elected officials in the government of the United States have condoned them. This is not the case with foreign law, foreign precedent, and international consensuses that are cited in judicial opinions. The sovereignty argument explored above makes this point when discussing the countermajoritarian concern.

While many argue that the use of foreign norms as justification for U.S. Supreme Court decisions is simply unacceptable, one of the strongest arguments for foreign citation comes from the nature of the treaties themselves. Perhaps the reason why so many countries, diverse in economies, ethnicities, governments and societal structures, are all able to sign onto treaties dealing with human rights is that there is some common ground that opponents of the use of international norms do not want to recognize. This common ground that reaches across cultural and geographic barriers is the idea that human life, whether male or female, young or old, American or African or Middle Eastern, is essentially of value in and of itself. It is for this reason that it becomes hard for some justices to ignore the fact that a majority of countries treat life issues one way or another. By life issues I mean those issues, such as abortion or capital punishment, that have some impact on the life of an individual. By impact I mean that the issue

in question would have some affect on the quality of life of the individual or, more directly, have some affect on if the individual could continue to live. Specifically, capital punishment cases are often decided on the basis of what constitutes cruel and unusual punishment. It seems as though these death penalty cases are often at the forefront of the debate over the use of international norms. Many have argued that the use of international norms in these cases is due to the nature of what is being decided, since human life exists in all countries, irrespective of a country's politics, religions, cultures, or ethnic backgrounds.

As stated in the introduction, however, while the use of international norms is certainly not something new to judicial interpretation, it is now a frequent topic of scholarly writing on American jurisprudence as well as discussions of the jurisprudence of specific justices. As I have already expounded, in the other parts of this paper, on the scholarly analysis of this topic, I feel it is now important to go directly to the opinions of the court. Not only will these opinions give insight into the exact reasoning of the justices, but it will also aid in predicting future outcomes of cases dealing with issues of life and the citation of foreign sources. I have chosen five cases, spanning over a period of 20 years, which have explicitly referenced the appropriate or inappropriate use of international norms or how to determine a societal consensus when deciding the constitutionality of a death sentence imposed on an individual. Three cases involve a death sentence imposed on a minor and two cases involve a death sentence imposed on a mentally retarded individual. The five cases were chosen because of their consistent appearance in constitutional law books referencing important death penalty cases that were decided by the Supreme Court. Also, scholarly writing identified these cases as important in the debate over the use of international norms. These cases are Thompson v. Oklahoma[73], Penry v. Lynaugh[74],

[73] 487 U.S. 815 (1988)
[74] 492 U.S. 302 (1989)

Stanford v. Kentucky[75], Atkins v. Virginia[76], and Roper v. Simmons[77]. An explanation of each case, as well as a brief analysis of the opinions, is below.

Thompson v. Oklahoma, 487 U.S. 815 (1988)

William Wayne Thompson, at the age of 15, was convicted of murder in the first degree for the death of his ex brother in law. He had been tried as an adult and was sentenced to death. His case was appealed to the Court of Criminal Appeals of Oklahoma, where the lower court's decision was affirmed. Upon appeal to the U.S. Supreme Court, the case was granted a writ of certiorari. The question being considered in this case was whether or not the execution of a 15 year old violated the Eight Amendment's prohibition against cruel and unusual punishment. The court, in answering this question, found in favor of the petitioner. Having noted that the Eighth Amendment applied to the states through the Fourteenth Amendment, the court deemed the execution of persons under the age of 16 unconstitutional. In explaining their decision, the court took notice of the state laws against the execution of someone under the age of 16, as well as an evolving standard of decency that could be identified as being against the execution of such persons.

The court, in its plurality opinion, addressed the citation of foreign sources of law when developing a barometer for standards of decency. While is had previously made use of international and foreign materials, "the Supreme Court moved its consideration of foreign law

[75] 492 U.S. 361 (1989)
[76] 536 U.S. 304 (2002)
[77] 543 U.S. 551 (2005)

from the footnotes…to the text of the [opinion], written by Justice Stevens."[78] The opinion stated:

> The conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community.[79]

In the footnote associated with the above quote, Stevens qualifies his findings with several cases in which the court has "previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual."[80] The court, with this opinion, "revisited foreign sources of law in striking down a state criminal statute."[81] This practice, as Calabresi and Zimdahl point out, had its beginnings in *Trop v Dulles*.[82] As mentioned above, Scalia had identified *Trop* as the first opinion employing the use of foreign sources in jurisprudence.

Justice Scalia wrote the dissenting opinion in *Thompson*. He was joined by Chief Justice Rehnquist and Justice White. The dissent took issue with the plurality's reference to international norms and laws, stating that the determination of law should take stock of our views and practices, not those of the rest of the world.[83]

> But where there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be

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[78] Calabresi, Steven and Zimdahl, Stephanie *The Supreme court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision,* 47:743 WILLIAM AND MARY LAW REV. 858 (2005-2006) citing 487 U.S. 815 (1988) at 830-831
[79] 487 U.S. 815 (1988) at 830
[80] *Id* at 830, n. 31 (the references Steven's refers to are Trop v. Dulles, 356 U.S. 86, 102, and n. 35 (1958); Coker v. Georgia, 433 U.S. at 596, n. 10; Enmund v. Florida, 458 U.S. at 796-797, n. 22.)
[81] *supra* 78 at 859
[82] 356 U.S. 86 (1958)
[83] *supra* 79 at 868-869

> imposed upon Americans through the Constitution. In the present case, therefore, the fact that a majority of foreign nations would not impose capital punishment upon persons under 16 at the time of the crime is of no more relevance than the fact that a majority of them would not impose capital punishment at all, or have standards of due process quite different from our own.[84]

These, along with several other parts of the opinion and dissent, deal directly with the use of international norms in American jurisprudence. While Justice O'Connor concurred with no reference to foreign law, "*Thompson* [is an] Eighth Amendment decision that is founded upon foreign sources of law."[85]

Penry v. Lynaugh, 492 U.S. 302 (1989)

Almost one year after handing down the decision in *Thompson*, the court partially confirmed and partially reversed a lower court's decision regarding the sentence imposed on Johnny Paul Penry. Penry was a mentally retarded individual with the intelligence of a 9 or 10 year old. He was tried, convicted of murder, and was given the death penalty. A writ of certiorari was granted. The court was to consider two questions. The first was whether Penry's death sentence violated the Eighth Amendment due to the fact that the jury in his original trial was not instructed that it could take into account mitigating evidence (i.e. his limited mental capacity) when imposing its sentence. The second question the court was to consider was whether the Eighth Amendment prohibited his execution, based on the fact that he was mentally retarded.

The opinion overturned the lower court's decision and remanded the matter for further proceedings because they found that the jury was not "able to consider and give effect to all of Penry's mitigating evidence in answering the special issues without any jury instructions on

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[84] *Id* at 868, n.4
[85] *supra* 78 at 860

mitigating evidence."[86] As for the second question, the court found that the execution of Penry did not violate the Eighth Amendment because he was found competent to stand trial. Addressing the more broad question of whether or not it would violate the Eighth Amendment to execute *any* mentally retarded person, the court found that it would not because of the varying degrees of competence a mentally retarded person could have. In other words, they found that there was no basis to generalize that all mentally retarded persons lacked the competence to be held accountable for their crimes.

The opinion and subsequent partial concurrences and dissents do not engage in a debate over the use of international citation. I would argue this is because the only reference to foreign law in O'Connor's opinion is common law. Because it is widely accepted that our Constitution is based off of principles of English law, in determining the meaning of the Constitution it is not objectionable to look to the sources that informed it. Scalia, an originalist in terms of Constitutional interpretation, has condoned the reference to common law under the auspices that it would be helpful in illuminating the intentions of the Framers. O'Connor avoids the use of international citation in this opinion, just as she had in the *Thompson* concurrence a year earlier.

There are a few things in the opinion, however, that I did find interesting with reference to the use of international norms. First, there were ample opportunities within the opinion to cite foreign law and practices with regard to the execution of mentally retarded persons. The defense claimed that there was "objective evidence…of an emerging national consensus against the execution of the mentally retarded…"[87] Penry argued that is reflected the "evolving standards of decency that mark the progress of a maturing society."[88] This same argument in the *Thompson* decision seemed to open the floodgates, so to speak, for referencing foreign law and practice. In

[86] 492 U.S. 302 (1989)
[87] *Id* at 333-334
[88] *Trop v. Dulles*, 356 U.S., at 101

Penry, however, none of the Justices touched on the subject of international citation. This could be due to the difference in authorship between the two opinions. Or it could be a worry among the justices that involving foreign sources in yet another aspect of the application of the death penalty would cause a greater upheaval among politically minded people than they were willing to handle.

This brings me to my next point. Justice O'Connor says that when considering the application of the death penalty to a specific class of offenders, the courts rely largely on "objective evidence such as the judgments of legislatures and juries."[89] This in turn, relies heavily on the politics of the legislatures. It seems ironic that when deciding questions regarding the violation of the Eighth amendment, it would look to the legislature, which has, more recently, become very aware of the Court's use of foreign sources. If it is still the case today that the Court looks to the legislature for cues as to what violates the Eighth Amendment, it would seem that they would also pay attention when the legislature passes resolutions and holds hearing on the use of foreign sources in evaluating the Eighth Amendment. One could argue that the legislature is not only giving them cues as to what Americans feel violates the Eighth Amendment, but also cues regarding the appropriate sources to consult when the Court is presented with a case such as *Penry*.

Stanford v. Kentucky, 492 U.S. 361 (1989)

The same day the court handed down their opinion on *Penry*, the case of *Stanford v. Kentucky* was also decided. The Court held that the Eighth Amendment's prohibition of cruel and unusual punishment was not violated when a state allowed capital punishment to be imposed on convicted persons of age 16 or 17. In this case, a Kentucky boy, age 17 years and 4 months,

[89] *supra* 86 at 335

raped, sodomized, and murdered a gas station attendant. The Jefferson District Court in Kentucky held a series of hearings to determine if the boy should be tried as an adult. The District Court determined that state law allowed for them to try the boy as an adult and proceeded to do so. He was convicted of murder, among other charges, and was sentenced to death. Upon appeal, the Kentucky Supreme Court upheld the ruling, thereby rejecting the boy's claim that he had a constitutional right to treatment. The U.S. Supreme Court accepted the case on certiorari and affirmed the lower court's decision.

Justice Scalia, writing the opinion for the court, concluded that there was no national consensus forbidding a sentence of death to convicted persons of 16 or 17 years of age. Scalia remarked "[o]f the 37 States whose laws permit capital punishment, 15 decline to impose it upon 16-year-old offenders and 12 decline to impose it on 17-year-old offenders. This does not establish the degree of national consensus this Court has previously thought sufficient to label a particular punishment cruel and unusual." [90] Furthermore, Scalia asserted that "in determining what standards have "evolved," however, we have looked not to our own conceptions of decency, but to those of modern American society as a whole."[91] In a footnote to the above quote, Scalia makes a pointed reference to the dissenting opinion, stating that they have accepted various amici that reference the practices of other countries. He then quotes himself from the *Thompson* decision to emphasize his point. Scalia, with the passage below, leaves little doubt as to his feelings regarding the place of foreign sources in American jurisprudence.

> We emphasize that it is American conceptions of decency that are dispositive, rejecting the contention of petitioners and their various amici (accepted by the dissent, see post at 389-390) that the sentencing practices of other countries are relevant. While

[90] 492 U.S. 361 (1989) at 370-371 (citations omitted)
[91] *Id* at 369

> [t]he practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely an historical accident, but rather so "implicit in the concept of ordered liberty" that it occupies a place not merely in our mores, but, text permitting, in our Constitution as well,
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> *Thompson v. Oklahoma,* 487 U.S. 815, 868-869, n. 4 (1988) (SCALIA, J., dissenting), quoting *Palko v. Connecticut,* 302 U.S. 319, 325 (1937) (Cardozo, J.), they cannot serve to establish the first Eighth Amendment prerequisite, that the practice is accepted among our people.[92]

Justice Brennan authored the dissent in *Stanford*, and was joined by Justices Marshall, Blackmun, and Stevens. They disagreed with the majority, arguing that executing any person who is below the age of 18 constitutes cruel and unusual punishment under the Eighth Amendment. They had several reasons for their opinion, the most relevant to my analysis being that the constitutionality of a punishment, such as the death penalty, is not the end but rather the beginning of one's review of contemporary standards of decency. Not only did Brennan disagree with the importance Scalia put on the constitutions of the states in terms of their current laws regarding the juvenile death penalty, but he saw great relevance in the amici that were submitted to the court. Perhaps the most important function of the amici was to inform the justices of the norms, practices, and laws of other nations. Not only did the dissent cite U.S. case law supporting the use of foreign sources, but Brennan used the amici to build his own argument for their use.

> Our cases recognize that objective indicators of contemporary standards of decency in the form of legislation in other countries is also of relevance to Eighth Amendment analysis. *Thompson, supra,* at 830-831; *Enmund,* 458 U.S. at 796, n. 22; *Coker,* 433 U.S. at 596, n. 10; *Trop v. Dulles,* 356 U.S. at 102, and n. 35. Many countries, of course -- over 50,

[92] *Id* at 369, n.1

> including nearly all in Western Europe -- have formally abolished the death penalty, or have limited its use to exceptional crimes such as treason. App. to Brief for Amnesty International as *Amicus Curiae.* Twenty-seven others do not in practice impose the penalty. *Ibid.* Of the nations that retain capital punishment, a majority -- 65 -- prohibit the execution of juveniles. *Ibid.* Sixty-one countries retain capital punishment and have no statutory provision exempting juveniles, though some of these nations are ratifiers of international treaties that do prohibit the execution of juveniles. *Ibid.* Since 1979, Amnesty International has recorded only eight executions of offenders under 18 throughout the world, three of these in the United States. The other five executions were carried out in Pakistan, Bangladesh, Rwanda, and Barbados. In addition to national laws, three leading human rights treaties ratified or signed by the United States explicitly prohibit juvenile death penalties. Within the world community, the imposition of the death penalty for juvenile crimes appears to be overwhelmingly disapproved.[93]

Once again, just as with the *Thompson* and *Penry* decisions, O'Connor avoided addressing what she takes to be the proper use of international norms in American jurisprudence, if any. She does, however, mention in *Stanford* that referencing American legislatures greatly informs our assessment of standards of decency. She does not say anything about using foreign laws but at the same time does not make a huge point of keeping our mind on American, as Scalia does. It is almost as if she is observing the debate from a distance and is trying to decide which side to support.

Atkins v. Virginia, 536 U.S. 304 (2002)

A little over a decade after *Penry* was decided, the Supreme Court handed down its decision in *Atkins v. Virginia*. One of the issues before the court in *Penry* had reappeared, but this time the use of foreign sources was being debated in the pages of the opinion, where as a decade earlier it was not explicitly mentioned. The court, in deciding *Atkins*, was deciding whether the execution of a mentally retarded person constituted cruel and unusual punishment,

[93] *Id* at 389-390 (citations omitted)

prohibited by the Eighth Amendment. Daryl Renard Atkins was on trial in Virginia for capital murder, among other crimes. The defense in his case called witnesses who testified that Atkins was mildly mentally retarded. The jury sentenced Atkins to death but the Supreme Court of Virginia ordered another sentencing hearing because an incorrect form had been used at the first hearing. The same witness testified again as to Atkins' mental capacity but this time the state was able to counter. Despite the second hearing, the sentence was the same and Atkins was again sentenced to death. In an appeal to the Supreme Court, the Court relied heavily on the finding in Penry v. Lynaugh and affirmed the lower courts ruling, rejecting Atkins' argument that he could not be sentenced to death because he was mentally retarded.

The U.S. Supreme Court heard the case and in a 6 to 3 opinion delivered by Justice Stevens, the Court overturned its previous ruling in *Penry* and held that the execution of a mentally retarded person was, in fact, cruel and unusual punishment prohibited by the Eighth Amendment. Not only did the Court find that a significant number of states were no longer practicing the execution of mentally retarded persons, but also that the deterrence factor present in most death sentences was not present in the case of a mentally retarded person due to their diminished capacity. While there are many complex issues surrounding this case, from an international law perspective this case "highlights not only the differences in opinions of the Rehnquist Court Justices regarding the execution of the mentally retarded, but also regarding the Supreme Court's citation and use of foreign laws."[94]

Unlike ten years prior when the Court heard *Penry*, Steven's argued that a national consensus had formed against the execution of mentally retarded persons and that the practice was "truly unusual."[95] Along with evidence gathered from the states concerning their practices

[94] *supra* 78 at 860
[95] 536 U.S. 304 (2002) at 316

and justifying a belief that a national consensus had formed, a footnote at the end of that section referenced numerous amici, both from U.S. and foreign organizations, which seemed to support a national consensus by also showing that there was a strong international consensus. The footnote referencing this is below.

> Additional evidence makes it clear that this legislative judgment reflects a much broader social and professional consensus. For example, several organizations with germane expertise have adopted official positions opposing the imposition of the death penalty upon a mentally retarded offender. In addition, representatives of widely diverse religious communities in the United States, reflecting Christian, Jewish, Muslim, and Buddhist traditions, have filed an amicus curiae brief explaining that even though their views about the death penalty differ, they all "share a conviction that the execution of persons with mental retardation cannot be morally justified." Moreover, within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved. Although these factors are by no means dispositive, their consistency with the legislative evidence lends further support to our conclusion that there is a consensus among those who have addressed the issue.[96]

The various citations for the above argument include amici from the European Union and the Catholic Conference. These direct citations to foreign sources go "beyond our nation's borders"[97] and are precisely what have Justices Scalia and Rehnquist concerned in their dissents. Scalia, in his dissent, reamed the majority opinion for referencing foreign sources that have been, according to Rehnquist, "explicitly rejected"[98] as having any relevance to the practices of America. When Parrish talks about the vitriolic responses from Justice Scalia, perhaps the quotation below from *Atkins* is what he is referencing.

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[96] *Id* at 316, n.21 (citations omitted)
[97] *supra* 78 at 861
[98] 536 U.S. 321 at 325 (Rehnquist, C.J., dissenting)

> But the Prize for the Court's Most Feeble Effort to fabricate "national consensus" must go to its appeal (deservedly relegated to a footnote) to the views of assorted professional and religious organizations, members of the so-called "world community," and respondents to opinion polls. I agree with the Chief Justice, that the views of professional and religious organizations and the results of opinion polls are irrelevant. Equally irrelevant are the practices of the "world community," whose notions of justice are (thankfully) not always those of our people. "We must never forget that it is a Constitution for the United States of America that we are expounding. … [W]here there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution."[99]

I think it is important to note that it seems as though Stevens was able to make the case against executions of mentally retarded persons through data regarding a national consensus, a consensus that dissenters most likely wouldn't object to based solely on its source. It is interesting that the majority opinion goes even further, beyond a national consensus, as if to make sure that the argument has the power of persuasion. The reason why this is important to point out is that a lot of the arguments against the use of international norms focus on the fact that the Court is justifying a decision based on foreign sources that have no relevance to the people of the United States. I think what is often misunderstood is that the jurisprudence initially *is* based off of our Constitution and/or an American consensus and that the foreign sources are used to strengthen the already existing argument, not invent one from scratch.

Roper v. Simmons, 543 U.S. 551 (2005)

While it seemed that the debate over the use of international norms in American jurisprudence had come to a head in the opinions of *Atkins v. Virginia*, the opinions written for *Roper v. Simmons* raised awareness of the debate exponentially. The question answered by

[99] 536 U.S. 321 at 347-348 (citations omitted)

Roper is whether the execution of a minor violates the Eighth Amendment prohibition of cruel and unusual punishment and whether it applies to the states through the Fourteenth Amendment. Christopher Simmons was sentenced to death in 1993 for the crime of murder, among other charges. He was only 17 years old at the time. State and federal appeals of the case lasted until 2002, each getting rejected. Then, in 2002, the Missouri Supreme Court issued a stay of execution for Simmons' pending the U.S. Supreme Courts decision in *Atkins v. Virginia*. Citing the opinion in *Atkins* referencing evolving standards of decency and an emerging national consensus, the Missouri Supreme Court decided to reconsider Simmons' case. The result was a 6-3 decision that overturned Simmons' death sentence. The Missouri Supreme Court argued that the decision of the U.S. Supreme Court in Stanford v. Kentucky was no longer valid, using the same arguments that overturned *Penry* in the *Atkins* decision.

The government appealed the case to the U.S. Supreme Court, arguing that allowing states to make determinations regarding the constitutionality of a national law would be a slippery slope, because states could just as easily overturn cases that prohibited action. The Supreme Court heard the case and in a 5 to 4 opinion ruled that the execution of minors did indeed constitute cruel and unusual punishment under the Eighth Amendment. What makes this case unique, besides the journey it took on the way to the Supreme Court, is that "Justice Kennedy's majority opinion…included a considerable and lengthy discussion of the laws and practices of foreign nations as well as international opinions and agreements."[100] For Justice Kennedy, "[the] determination that the death penalty [was] disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States [was] the only country in the world that continues to give official sanction to the juvenile death penalty."[101] The

[100] *supra* 78 at 864
[101] 543 U.S. 551 (2005) at 575

majority opinion considered numerous sources from around the world. While they insisted that these sources were not controlling the outcome of the case, the sources provided respected and significant confirmation for their conclusions.[102] To further support his argument, Kennedy reasoned that "…at least from the time of the Court's decision in *Trop*, the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of "cruel and unusual punishments.""[103] The majority opinion seemed to shame the United States for the fact that they were still executing juveniles up until this decision.

> "The Court specifically noted that the United States stood alone as an executor of juvenile offenders, as each of the seven countries that had executed juveniles since 1990-Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China-has since 'either abolished capital punishment for juveniles or made public disavowal of the practice.'"[104]

In addition to Justice Kennedy's opinion, Justice Stevens concurred, taking a dig at Scalia and pointing out the problem of the inflexibility of original intent.[105]

In response to the majority's extensive citation to foreign law, Scalia wrote a lengthy dissent, joined by Justices Rehnquist and Thomas, in which he decried the majority's abuse of foreign sources.

> "[T]he basic premise of the Court's argument–that American law should conform to the laws of the rest of the world–ought to be rejected out of hand… I do not believe that approval by "other nations and peoples" should buttress our commitment to American principles any more than (what should logically follow) disapproval by "other nations and peoples" should weaken that commitment. More importantly, however, the Court's

[102] *Id* at 578
[103] *Id* at 575
[104] *supra* 78 at 865 (citing 125 S. Ct. 1183 (2005) at 1199)
[105]

> statement flatly misdescribes what is going on here. Foreign sources are cited today, *not* to underscore our "fidelity" to the Constitution, our "pride in its origins," and "our own [American] heritage." To the contrary, they are cited *to set aside* the centuries-old American practice–a practice still engaged in by a large majority of the relevant States–of letting a jury of 12 citizens decide whether, in the particular case, youth should be the basis for withholding the death penalty. What these foreign sources "affirm," rather than repudiate, is the Justices' own notion of how the world ought to be, and their diktat that it shall be so henceforth in America. The Court's parting attempt to downplay the significance of its extensive discussion of foreign law is unconvincing. "Acknowledgment" of foreign approval has no place in the legal opinion of this Court *unless it is part of the basis for the Court's judgment*–which is surely what it parades as today.[106]

The above statement by Scalia is very much in keeping with "his other scathing dissents arguing against the use of foreign law in constitutional adjudication."[107]

Something that one doesn't immediately realize when reading the opinion is that Justice O'Connor writes a separate dissenting opinion in which she takes a stance on the role of international norms in American jurisprudence, albeit a hesitant one. While her opinion is in dissent of the majority, she speaks rather favorably towards an awareness of the world community, at least in could be said in comparison to Scalia.

> "[T]his Nation's evolving understanding of human dignity certainly is neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries. On the contrary, we should not be surprised to find congruence between domestic and international values, especially where the international community has reached clear agreement–expressed in international law or in the domestic laws of individual countries–that a particular form of punishment is inconsistent with fundamental human rights. At least, the existence of an international consensus of this nature can serve to confirm the reasonableness of a consonant and genuine American consensus."[108]

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[106] 543 U.S. 551 (2005) at 624, 628 (Justice Scalia, dissenting)
[107] *supra* 78 at 866
[108] 543 U.S. 551 (2005) at 605 (Justice O'Connor, dissenting)

Conclusion

The justifications for and against the use of international norms are present in the jurisprudence of the Supreme Court Justices. In the opinions authored by Justices Scalia and Breyer, the debate over the use of foreign sources seems to mirror the arguments presented above. Scalia, in the death penalty cases that were discussed, stressed that an originalist interpretation of the Constitution is the best way to protect American sovereignty. This is a combination of the constitutional interpretation and sovereignty arguments against the use of international norms. Beyond Justice Scalia's open rejection of citation of foreign sources, one must recognize that other Justices often join his majority or dissenting opinion. Chief Justice Rehnquist as well as Justice Thomas often joined Scalia in touting the use of international norms. In today's court, the traditional constitutionalist approach is taken not only by Justice Scalia and Thomas but also by Justices Roberts and Alito. Roberts is quoted above as saying that the citation of foreign law allows the justices to impose their own beliefs and preferences on the opinions of the court while Alito, in his confirmation hearings, expressed disapproval over the use of international norms.

It would seem that while these four Justices present strong arguments against the citation of international norms, the majority of the court's Justices recognize the importance of, and almost the necessity of, referencing foreign materials in their jurisprudence. Breyer, Kennedy, and Stevens have been the most prolific in authoring opinions which cite foreign sources, while Justices Ginsburg and Souter often do what O'Connor did in the above referenced cases. That is, they join in the opinions written by Breyer, Kennedy, or Stevens, and therefore accept citation of foreign sources. Often, this acceptance of foreign sources can be attributed to the view of the Constitutional as a

"living document" that is subject to interpretation and changes in public opinion. The present day argument for the use of international norms in American Jurisprudence is also a combination of the human rights justification presented above as well as a twist on the sovereignty argument often used by Justice Scalia. They argue that, not only do basic human rights transcend political and geographic boundaries, but also that because the United States is part of globalization, the sovereignty argument is no longer salient. Furthermore, the opinions of the court that cite foreign sources do so in a manner that is meant, the Justices argue, to support an already present national consensus, not to override one.

The more compelling argument, in my opinion, is in support of foreign sources in American jurisprudence. It seems as though the nature of our world today does not lend itself to an isolationist approach when it comes to constitutional interpretation. With increasing globalization, the United States can no longer afford to ignore the practices of the rest of the world, practices that often seem more civilized than our own. Particularly with the foreign policy objectives championed by the Bush administration, it seems very contradictory to invade a foreign county with the intention of "liberating people" when the Supreme Court of the United States still has trouble accepting the idea that what other countries practice matters to us. I believe there would be a stronger argument for the rejection of international sources if it were a consistent policy throughout all branches of our government. It is hard, however, to argue that the world should follow our example when the courts in the United States are still debating over whether to consider the example of others.